

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

STEVEN WESTMORELAND,

Plaintiff,

v.

WPX ENERGY, INC., KIMBERLY S.  
LUBEL, JOHN A. CARRIG, KELT  
KINDICK, ROBERT K. HERDMAN,  
VALERIE M. WILLIAMS, KARL F.  
KURZ, RICHARD E. MUNCRIEF,  
CLAY M. GASPAR, D. MARTIN  
PHILLIPS, and DOUGLAS E.  
SWANSON, JR.,

Defendants.

Civil Action No.

**COMPLAINT FOR VIOLATIONS  
OF THE FEDERAL SECURITIES  
LAWS**

**JURY TRIAL DEMANDED**

Plaintiff Steven Westmoreland (“Plaintiff”) by and through his undersigned attorneys, brings this action on behalf of himself, and alleges the following based upon personal knowledge as to those allegations concerning Plaintiff and, as to all other matters, upon the investigation of counsel, which includes, without limitation: (a) review and analysis of public filings made by WPX Energy, Inc. (“WPX” or the “Company”) and other related parties and non-parties with the United States Securities and Exchange Commission (“SEC”); (b) review and analysis of press releases and other publications disseminated by certain of the Defendants (defined below) and other related non-parties; (c) review of news articles, shareholder communications, and postings

on the Company's website concerning the Company's public statements; and (d) review of other publicly available information concerning WPX and the Defendants.

### **SUMMARY OF THE ACTION**

1. This is an action brought by Plaintiff against WPX and the Company's Board of Directors (the "Board" or the "Individual Defendants") for their violations of Section 14(a) and 20(a) of the Securities Exchange Act of 1934, 15.U.S.C. §§ 78n(a), 78t(a), and SEC Rule 14a-9, 17 C.F.R. 240.14a-9, in connection with the proposed sale of the Company to Devon Energy Corporation ("Parent") and East Merger Sub, Inc. ("Merger Sub," and together with Parent, "Devon") (the "Proposed Transaction").

2. On September 26, 2020, the Company entered into an Agreement and Plan of Merger (the "Merger Agreement") with Devon. Pursuant to the terms of the Merger Agreement the Company's shareholders will receive 0.5165 of a share of Parent common stock per share of WPX owned (the "Merger Consideration").

3. On November 5, 2020, in order to convince the Company's shareholders to vote in favor of the Proposed Transaction, the Board authorized the filing of a materially incomplete and misleading registration statement with the SEC on Form S-4 (the "Registration Statement"), in violation of Sections 14(a) and 20(a) of the Exchange Act.

4. For these reasons, and as set forth in detail herein, Plaintiff asserts claims against WPX and the Board for violations of Sections 14(a) and 20(a) of the Exchange Act and Rule 14a-9. Plaintiff seeks to enjoin Defendants from taking any steps to consummate the Proposed Transaction unless and until the material information discussed below is disclosed to WPX shareholders before the vote on the Proposed Transaction or, in the event the Proposed

Transaction is consummated, recover damages resulting from the Defendants' violations of the Exchange Act.

### **JURISDICTION AND VENUE**

5. This Court has subject matter jurisdiction over all claims asserted herein pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa, and 28 U.S.C. § 1331, as Plaintiff alleges violations of Sections 14(a) and 20(a) of the Exchange Act.

6. This Court has personal jurisdiction over all of the Defendants because each is either a corporation that conducts business in, solicits shareholders in, and/or maintains operations within, this District, or is an individual who is either present in this District for jurisdictional purposes or has sufficient minimum contacts with this District so as to make the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

7. Venue is proper under 28 U.S.C. § 1391 because a substantial portion of the transactions and wrongs complained of herein occurred in this District.

### **THE PARTIES**

8. Plaintiff is, and has been at all times relevant hereto, the owner of WPX shares.

9. Defendant WPX is incorporated under the laws of Delaware and has its principal executive offices located at 3500 One Williams Center, Tulsa, Oklahoma 74172. The Company's common stock trades on the New York Stock Exchange under the symbol "WPX."

10. Defendant Kimberly S. Lubel ("Lubel") is and has been a director of WPX at all times during the relevant time period.

11. Defendant John A. Carrig ("Carrig") is and has been a director of WPX at all times during the relevant time period.

12. Defendant Kelt Kindick (“Kindick”) is and has been a director of WPX at all times during the relevant time period.

13. Defendant Robert K. Herdman (“Herdman”) is and has been a director of WPX at all times during the relevant time period.

14. Defendant Valerie M. Williams (“Williams”) is and has been a director of WPX at all times during the relevant time period.

15. Defendant Karl F. Kurz (“Kurz”) is and has been a director of WPX at all times during the relevant time period.

16. Defendant Richard E. Muncrief (“Muncrief”) is and has been the Company’s Chief Executive Officer and Chairman of the Board at all times during the relevant time period.

17. Defendant Clay M. Gaspar (“Gaspar”) is and has been the Company’s President and a director at all times during the relevant time period.

18. Defendant D. Martin Phillips (“Phillips”) is and has been a director of WPX at all times during the relevant time period.

19. Defendant Douglas E. Swanson, Jr. (“Swanson”) is and has been a director of WPX at all times during the relevant time period.

20. Defendants Lubel, Carrig, Kindick, Herdman, Williams, Kurz, Muncrief, Gaspar, Phillips, and Swanson are collectively referred to herein as the “Individual Defendants.”

21. The Individual Defendants, along with Defendant WPX, are collectively referred to herein as “Defendants.”

## **SUBSTANTIVE ALLEGATIONS**

### **Background of the Company**

22. WPX is an independent oil and natural gas exploration and production company engaged in the development of long-life unconventional properties. WPX is focused on profitably exploiting, developing and growing its oil positions in the Delaware Basin (a subset of the Permian Basin) in Texas and New Mexico and the Williston Basin in North Dakota.

### **The Company Announces the Proposed Transaction**

23. On September 28, 2020, the Company jointly issued a press release announcing the Proposed Transaction. The press release stated in part:

OKLAHOMA CITY and TULSA, Okla., Sept. 28, 2020 (GLOBE NEWSWIRE) -- Devon Energy (“Devon”) (NYSE: DVN) and WPX Energy (“WPX”) (NYSE: WPX) today announced they have entered into an agreement to combine in an all-stock merger of equals transaction. The strategic combination will create a leading unconventional oil producer in the U.S., with an asset base underpinned by a premium acreage position in the economic core of the Delaware Basin. The combined company, which will be named Devon Energy, will benefit from enhanced scale, improved margins, higher free cash flow and the financial strength to accelerate the return of cash to shareholders through an industry-first “fixed plus variable” dividend strategy.

### **TRANSACTION DETAILS**

Under the terms of the agreement, WPX shareholders will receive a fixed exchange ratio of 0.5165 shares of Devon common stock for each share of WPX common stock owned. The exchange ratio, together with closing prices for Devon and WPX on Sept. 25, 2020, results in an enterprise value for the combined entity of approximately \$12 billion. Upon completion of the transaction, Devon shareholders will own approximately 57 percent of the combined company and WPX shareholders will own approximately 43 percent of the combined company on a fully diluted basis.

The transaction, which is expected to close in the first quarter of 2021, has been unanimously approved by the boards of directors of both companies. Funds managed by EnCap Investments L.P. own approximately 27 percent of the outstanding shares of WPX and have entered into a support agreement to vote in

favor of the transaction. The closing of the transaction is subject to customary closing conditions, including approvals by Devon and WPX shareholders.

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## **LEADERSHIP AND HEADQUARTERS**

Following the merger, the board of directors will consist of 12 members, 7 directors from Devon and 5 from WPX including the lead independent director. Dave Hager will be appointed executive chairman of the board, and Rick Muncrief will be named president and CEO. The combined company's executive team will include Jeff Ritenour as executive vice president and chief financial officer, Clay Gaspar as executive vice president and chief operating officer, David Harris as executive vice president and chief corporate development officer, Dennis Cameron as executive vice president and general counsel, and Tana Cashion as senior vice president of human resources. The combined company will be headquartered in Oklahoma City.

## **PRELIMINARY PRO FORMA 2021 OUTLOOK**

Detailed forward-looking guidance for the full-year 2021 will be provided upon closing of the transaction. Based on current supply and demand dynamics, product inventory levels, and other leading economic indicators, the company expects to design capital activity plans to maintain base production.

The maintenance capital requirements to keep oil production flat in 2021 versus 2020 fourth-quarter exit rates of greater than 280,000 barrels per day is estimated at approximately \$1.7 billion. Pro forma for cost synergies, these maintenance capital requirements in 2021 are estimated to be funded at \$33 WTI and \$2.75 Henry Hub pricing.

## **ADVISORS**

J.P. Morgan Securities LLC is serving as financial advisor and Skadden, Arps, Slate, Meagher & Flom LLP is serving as legal advisor to Devon. Citi is serving as financial advisor and Kirkland & Ellis LLP is serving as legal advisor to WPX. Vinson & Elkins LLP is serving as legal advisor to EnCap Investments L.P.

## **FALSE AND MISLEADING STATEMENTS AND/OR MATERIAL OMISSIONS IN THE REGISTRATION STATEMENT**

24. On November 5, 2020, the Company authorized the filing of the Registration Statement with the SEC. The Registration Statement recommends that the Company's shareholders vote in favor of the Proposed Transaction.

25. Defendants were obligated to carefully review the Registration Statement prior to its filing with the SEC and dissemination to the Company's shareholders to ensure that it did not contain any material misrepresentations or omissions. However, the Registration Statement misrepresents and/or omits material information that is necessary for the Company's shareholders to make informed decisions regarding whether to vote in favor of the Proposed Transaction, in violation of Sections 14(a) and 20(a) of the Exchange Act.

**Material False and Misleading Statements or Material Misrepresentations or Omissions Regarding the Company's Financial Projections**

26. The Registration Statement contains projections prepared by the Company's and Devon's management concerning the Proposed Transaction, but fails to provide material information concerning such.

27. The SEC has repeatedly emphasized that disclosure of non-GAAP projections can be inherently misleading, and has therefore heightened its scrutiny of the use of such projections.<sup>1</sup> Indeed, on May 17, 2016, the SEC's Division of Corporation Finance released new and updated Compliance and Disclosure Interpretations ("C&DIs") on the use of non-GAAP financial measures that demonstrate the SEC's tightening policy.<sup>2</sup> One of the new C&DIs regarding forward-looking information, such as financial projections, explicitly requires companies to provide any reconciling metrics that are available without unreasonable efforts.

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<sup>1</sup> See, e.g., Nicolas Grabar and Sandra Flow, Non-GAAP Financial Measures: The SEC's Evolving Views, Harvard Law School Forum on Corporate Governance and Financial Regulation (June 24, 2016), *available at* <https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-measurestheseecs-evolving-views/>; Gretchen Morgenson, Fantasy Math Is Helping Companies Spin Losses Into Profits, N.Y. Times, Apr. 22, 2016, *available at* [http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-into-profits.html?\\_r=0](http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-into-profits.html?_r=0).

<sup>2</sup> Non-GAAP Financial Measures, Compliance & Disclosure Interpretations, U.S. SECURITIES AND EXCHANGE COMMISSION (May 17, 2017), *available at* <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm>.

28. In order to make management's projections included in the Registration Statement materially complete and not misleading, Defendants must provide a reconciliation table of the non-GAAP measures to the most comparable GAAP measures.

29. Specifically, with respect to the Company's projections, the Company must disclose the line item projections for the financial metrics that were used to calculate the non-GAAP measures, including: (i) Adjusted EBITDA; and (ii) projected free cash flows.

30. With respect to Devon's projections, the Company must disclose the line item projections for the financial metrics that were used to calculate the non-GAAP measures, including: (i) Adjusted EBITDA; and (ii) projected free cash flows.

31. Disclosure of the above information is vital to provide investors with the complete mix of information necessary to make an informed decision when voting on the Proposed Transaction. Specifically, the above information would provide shareholders with a better understanding of the analyses performed by the Company's financial advisor in support of its opinion.

**Material False and Misleading Statements or Material  
Misrepresentations or Omissions Regarding Citi's Financial Opinion**

32. The Registration Statement contains the financial analyses and opinion of Citigroup Global Markets Inc ("Citi") concerning the Proposed Transaction, but fails to provide material information concerning such.

33. With respect to Citi's *Selected Public Companies Analyses*, the Registration Statement fails to disclose the individual multiples and metrics for each of the individual companies observed in Citi's analyses.

34. With respect to Citi's *Discounted Cash Flow Analysis* for WPX, the Registration Statement fails to disclose: (i) the standalone unlevered free cash flows that WPX was forecasted



to generate during the fiscal years ending December 31, 2021 through December 31, 2025 used in the analysis and all underlying line items; (ii) WPX's net operating loss carryforwards expected by WPX's management during the forecast period; (iii) terminal values; (iv) the estimated cash taxes used in the analysis; (v) the individual inputs and assumptions underlying Citi's selection of discount rates ranging from 7.7% to 8.5%; and (vi) the basis for Citi's application of a selected range of adjusted EBITDA multiples of 3.9x to 5.3x to WPX's fiscal year 2025 estimated adjusted EBITDA.

35. With respect to Citi's *Discounted Cash Flow Analysis* for Devon, the Registration Statement fails to disclose: (i) the standalone unlevered free cash flows that Devon was forecasted to generate during the fiscal years ending December 31, 2021 through December 31, 2025 used in the analysis and all underlying line items; (ii) Devon's net operating loss carryforwards during the forecast period as estimated by WPX's management; (iii) terminal values; (iv) the estimated cash taxes used in the analysis; (v) the individual inputs and assumptions underlying Citi's selection of the discount rates ranging from 7.8% to 8.8%; and (vi) the basis for Citi's application of a selected range of adjusted EBITDA multiples of 3.9x to 5.3x to Devon's fiscal year 2025 estimated adjusted EBITDA.

36. With respect to Citi's *Net Asset Value Analysis* for WPX, the Registration Statement fails to disclose: (i) the unlevered, after-tax free cash flows that WPX was forecasted to generate from WPX's proved developed producing reserves and currently undeveloped resources used in the analysis and all underlying line items; (ii) the projected midstream distributions of Catalyst Midstream Partners LLC to WPX during the fiscal years ending December 31, 2021 through December 31, 2025; (iii) the basis for Citi's utilization of a terminal adjusted EBITDA multiple of 4.1x for the terminal value; (iv) WPX's estimated non-drilling and

completion capital expenditures, corporate expenses, net hedge, and other gains and losses; (v) WPX's estimated net debt; (vi) the net operating loss carryforwards expected by WPX's management during the forecast period; and (vii) the individual inputs and assumptions underlying Citi's selection of the range of discount rates of 7.7% to 8.5%.

37. With respect to Citi's *Net Asset Value Analysis* for Devon, the Registration Statement fails to disclose: (i) the individual inputs and assumptions underlying Citi's selection of the range of discount rates of 7.8% to 8.8%; (ii) the unlevered, after-tax free cash flows that Devon was forecasted to generate from Devon's proved developed producing reserves and currently undeveloped resources used in the analysis and all underlying line items; (iii) Devon's estimated non-drilling and completion capital expenditures, corporate expenses, net hedge, and other gains and losses; (iv) Devon's estimated net debt; and (v) the net operating loss carryforwards expected by WPX's management during the forecast period.

38. With respect to Citi's analyses of price targets, the Registration Statement fails to disclose the price targets observed in the analyses as well as the sources thereof.

39. Lastly, the Registration Statement fails to disclose the amount of compensation Citi stands to receive in connection with its services in furtherance of the Proposed Transaction

40. When a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed. Moreover, the disclosure of projected financial information is material because it provides shareholders with a basis to project the future financial performance of a company and allows shareholders to better understand the financial analyses performed by the Company's financial advisor in support of its fairness opinion.

41. Without the above described information, the Company's shareholders are unable to cast a fully informed vote on the Proposed Transactions. Accordingly, in order to provide shareholders with a complete mix of information, the omitted information described above should be disclosed.

## **COUNT I**

### **(Against All Defendants for Violations of Section 14(a) of the Exchange Act and Rule 14a-9 Promulgated Thereunder)**

42. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

43. Section 14(a)(1) of the Exchange Act makes it "unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title." 15 U.S.C. § 78n(a)(1).

44. Rule 14a-9, promulgated by the SEC pursuant to Section 14(a) of the Exchange Act, provides that communications with stockholders in a recommendation statement shall not contain "any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. § 240.14a-9.

45. Defendants have issued the Registration Statement with the intention of soliciting shareholders support for the Proposed Transaction. Each of the Defendants reviewed and

authorized the dissemination of the Registration Statement, which fails to provide critical information regarding, among other things, the financial projections for the Company.

46. In so doing, Defendants made untrue statements of fact and/or omitted material facts necessary to make the statements made not misleading. Each of the Defendants, by virtue of their roles as officers and/or directors, were aware of the omitted information but failed to disclose such information, in violation of Section 14(a). The Defendants were therefore negligent, as they had reasonable grounds to believe material facts existed that were misstated or omitted from the Registration Statement, but nonetheless failed to obtain and disclose such information to shareholders although they could have done so without extraordinary effort.

47. The Defendants knew or were negligent in not knowing that the Registration Statement is materially misleading and omits material facts that are necessary to render it not misleading. The Defendants undoubtedly reviewed and relied upon the omitted information identified above in connection with their decision to approve and recommend the Proposed Transaction.

48. The Defendants knew or were negligent in not knowing that the material information identified above has been omitted from the Registration Statement, rendering the sections of the Registration Statement identified above to be materially incomplete and misleading. Indeed, the Defendants were required to be particularly attentive to the procedures followed in preparing the Registration Statement and review it carefully before it was disseminated, to corroborate that there are no material misstatements or omissions.

49. The Defendants were, at the very least, negligent in preparing and reviewing the Registration Statement. The preparation of a Registration Statement by corporate insiders containing materially false or misleading statements or omitting a material fact constitutes

negligence. The Defendants were negligent in choosing to omit material information from the Registration Statement or failing to notice the material omissions in the Registration Statement upon reviewing it, which they were required to do carefully as the Company's directors. Indeed, the Defendants were intricately involved in the process leading up to the signing of the Merger Agreement and the preparation of the Company's financial projections.

50. The misrepresentations and omissions in the Registration Statement are material to Plaintiff, who will be deprived of his right to cast an informed vote if such misrepresentations and omissions are not corrected prior to the vote on the Proposed Transaction.

51. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff be fully protected from the immediate and irreparable injury that Defendants' actions threaten to inflict.

## **COUNT II**

### **(Against the Individual Defendants for Violations of Section 20(a) of the Exchange Act)**

52. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

53. The Individual Defendants acted as controlling persons of WPX within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as officers and/or directors of WPX, and participation in and/or awareness of the Company's operations and/or intimate knowledge of the incomplete and misleading statements contained in the Registration Statement filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision making of the Company, including the content and dissemination of the various statements that Plaintiff contends are materially incomplete and misleading.

54. Each of the Individual Defendants was provided with, or had unlimited access to, copies of the Registration Statement and other statements alleged by Plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

55. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the Exchange Act violations alleged herein, and exercised the same. The Registration Statement at issue contains the unanimous recommendation of each of the Individual Defendants to approve the Proposed Transaction. They were thus directly involved in preparing this document.

56. In addition, as set forth in the Registration Statement sets forth at length and described herein, the Individual Defendants were involved in negotiating, reviewing, and approving the Merger Agreement. The Registration Statement purports to describe the various issues and information that the Individual Defendants reviewed and considered. The Individual Defendants participated in drafting and/or gave their input on the content of those descriptions.

57. By virtue of the foregoing, the Individual Defendants have violated Section 20(a) of the Exchange Act.

58. As set forth above, the Individual Defendants had the ability to exercise control over and did control a person or persons who have each violated Section 14(a) and Rule 14a-9 by their acts and omissions as alleged herein. By virtue of their positions as controlling persons, these Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of Individual Defendants' conduct, Plaintiff will be irreparably harmed.

59. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff be fully protected from the immediate and irreparable injury that Defendants' actions threaten to inflict.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays for judgment and relief as follows:

- A. Preliminarily and permanently enjoining Defendants and all persons acting in concert with them from proceeding with, consummating, or closing the Proposed Transaction;
- B. Directing the Individual Defendants to disseminate an Amendment to the Registration Statement that does not contain any untrue statements of material fact and that states all material facts required in it or necessary to make the statements contained therein not misleading;
- C. Directing Defendants to account to Plaintiff for all damages sustained because of the wrongs complained of herein;
- D. Awarding Plaintiff the costs of this action, including reasonable allowance for Plaintiff's attorneys' and experts' fees; and
- E. Granting such other and further relief as this Court may deem just and proper.

### **JURY DEMAND**

Plaintiff demands a trial by jury on all issues so triable.

Dated: November 20, 2020

Respectfully submitted,

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